

Appeal from a decision of the Snake River (Idaho) Area Office, Bureau of Land Management, rejecting right-of-way application IDI-28352.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Rights-of-Way--Rights-of-Way: Applications--Rights-of-Way: Federal Land Policy and Management Act of 1976

A BLM decision rejecting a right-of-way application for a water gathering and transportation system filed pursuant to sec. 501 of FLPMA will be affirmed where the record shows the decision to be a reasoned analysis of the facts involved, made with due regard for the public interest. Where the record contains uncontroverted evidence, in the form of analysis by a BLM wildlife biologist and other environmental analysis, showing that granting the application would adversely affect public land values, including grazing activities, wildlife, and riparian vegetation and habitat, BLM's rejection of the application will be affirmed.

APPEARANCES: Kenneth Knight, Malta, Idaho, pro se.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

Kenneth Knight has appealed from the April 1, 1992, decision by the Snake River (Idaho) Area Manager, Bureau of Land Management (BLM), rejecting right-of-way application IDI-28352.

On July 12, 1991, Vicky and Kenneth Knight (the Knights) filed the right-of-way application, seeking to construct, operate, and maintain a buried water gathering and pipeline system to obtain water from springs on public lands in secs. 22 and 27, T. 13 S., R. 25. E., Boise Meridian, Cassia County, Idaho. With their application, the Knights submitted a copy of approved water permit No. 43-07189, from the Idaho Department of Water Resources (IDWR), allowing for an appropriation of 0.30 cubic feet per second of water for 15 acres of privately owned lands in Cassia County.

BLM's decision held as follows:

Significant resource values are present in the spring area proposed for development. The series of small springs

[is] located on public land identified in the Cassia Resource Management Plan for retention in public ownership for multiple use management. These springs are an important water source on the north end of the Jim Sage Mountain Range. The water from the spring complex originates on, but seldom flows off of, the public land. The spring area supports a dense mix of aspen, wild rose, currant, elderberry, dogwood, native grasses and other riparian vegetation. Such vegetation complexes are limited on this mountain range. This riparian area has significant wildlife value and is largely undisturbed by man or livestock. The springs are within a critical mule deer winter range and are used in the summer for water and the dense vegetation is used for forage, shade, and cover. Other small mammals, upland game, non game species of wildlife, and some livestock make use of the riparian area. The Idaho Fish and Game Department points out that the area is critical habitat for mule deer and could become critical habitat for bighorn sheep as well.

Your proposal to collect and transport water off the public lands will seriously impact the BLM's ability [to] manage the resource of the area for multiple use and sustained yield. The proposed development would adversely impact the availability of the surface water to wildlife and domestic livestock, the continued growth of riparian vegetation, and seriously degrade the value of the wildlife habitat. There would be reduced grazing capacity for livestock.

Accordingly, BLM rejected the application for a right-of-way. ^{1/}

In his statement of reasons, Knight asserts that his project was not intended to dry up the area and that very little vegetation would have to be disturbed to construct it. Appellant questions BLM's conclusion that deer and bighorn sheep use the area. He states that sheep do not graze in the area and that there is ample water for cattle. Appellant believes that he has met necessary requirements and should be granted the right-of-way.

[1] BLM, as the duly authorized representative of the Secretary of the Interior, has discretion to accept or reject a right-of-way application for a water diversion project filed pursuant to section 501 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1761 (1988). C. B. Slabaugh, 116 IBLA 63, 65 (1990); Eugene V. Vogel, 52 IBLA 280, 283, 88 I.D. 258, 259 (1981); see Stanley S. Leach, 35 IBLA 53, 55 (1978). A BLM decision rejecting such application will be affirmed where the record shows that the decision represents a reasoned analysis of the factors involved with due regard for the public interest. C. B. Slabaugh, 116 IBLA at 65.

^{1/} BLM's decision also states that BLM has asserted its own water rights claim with the IDWR and that this claim has a priority date of Apr. 17, 1926, based upon Public Water Reserve No. 107. See n.2, below.

BLM's decision is based on an environmental assessment (EA) indicating that BLM's decision to reject the application was taken only after a diligent review indicated that the project would adversely impact BLM's multiple-use management objectives because of reduction of the availability of water. The EA states that song birds, small mammals, and mule deer tracks were observed during field examinations, and that the area is located within a critical deer winter range. Moreover, the area is within the Jim Sage Grazing Allotment No. 5003, and is grazed by both sheep and cattle between May and December. In addition to use by wildlife and livestock, the land is also used for recreational purposes. 2/

The EA also summarizes environmental impacts anticipated from project construction and generally concludes that such impacts would be insignificant and minor. However, the EA expresses concern about the impact on the water resource.

Appended to the EA as Exhibit F are comments by BLM's wildlife biologist Paul Makela. In his initial comments (July 18, 1991), Makela expressed concern that the tapping of the springs would result in a significant degradation of their value to wildlife. He felt that further careful consideration was needed, and that the proposed action was "not appropriate." In a subsequent comment dated December 16, 1991, Makela expressed reservations about the possibility of maintaining, restoring, and improving riparian values should the project be allowed. In a third comment (February 14, 1992), Makela stated that it was difficult to predict how many deer or other wildlife would be affected by a reduction in water availability. He suggested

2/ The EA acknowledges that appellant and his wife obtained a water permit from the State of Idaho and admits that BLM "did not protest this filing because they evidently did not see the public notification concerning it." The EA states further that the Area Office intends to file a "claim to these springs through the State's Snake River Basin adjudication process," that such claims have already been submitted to the BLM State Office, and that BLM considers its claims as "Federal Reserve claims with a priority date of April 17, 1926[,] based upon Public Water Reserve No. 107." By Executive Order No. 107, dated Apr. 17, 1926, the President of the United States ordered that every smallest legal subdivision of public land surveys which was vacant, unappropriated, unreserved public land, and which contained a spring or waterhole, be withdrawn and reserved for public use in accordance with the provisions of section 10 of the Act of Dec. 29, 1916 (39 Stat.

865, 43 U.S.C. § 300 (repealed by section 704(a) of FLPMA, 90 Stat. 2792)). The Executive Order was designed to preserve for general public use and benefit all unreserved public lands containing water holes or other bodies of water needed or used by the public for watering purposes. In this connection the EA suggests that the likelihood of controversy between BLM and appellant over rights to the water is itself a potentially adverse effect of the right-of-way.

In view of our conclusion that BLM's decision to reject the right-of-way is supported by the adverse environmental consequences cited in the EA, it is unnecessary to consider this question.

putting a moratorium on further spring developments in the Jim Sage Management Area until cumulative impacts could be more adequately addressed. An additional comment in the file, dated February 10, 1992, predicts that dewatering the area will cause a reduction in available animal unit months in the riparian zone, and in the availability of water for livestock.

In BLM's decision record, dated March 26, 1992, the Area Manager concluded that the right-of-way application should be denied, based on the finding that there was not sufficient water available to meet both the needs of the right-of-way and of the public lands, and the EA's failure to establish that riparian areas would not be adversely affected. ^{3/}

The case record shows that BLM's decision to reject the right-of-way is well reasoned and in the public interest. The crux of the matter is the availability and management of water, a scarce resource, and appellant has presented no evidence to indicate error in BLM's basic determination that the granting of the right-of-way and concomitant reduction of that resource, would, in all likelihood, adversely affect public land values, including grazing, wildlife, and riparian vegetation and wildlife habitat. The record is clear that, while construction of the improvements associated with the proposed right-of-way would have minimal immediate physical impact on the public lands, the effect of removal of water from those lands would be environmental degradation. Prevention of that degradation, by itself, justified BLM's rejection of the application. Compare, C. B. Slabaugh, 116 IBLA at 65 (ruling that BLM's concern that granting a right-of-way for a water pipeline in a wilderness study area might establish a vested water right was not unreasonable).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

David L. Hughes
Administrative Judge

I concur:

Bruce R. Harris
Deputy Chief Administrative Judge

^{3/} The decision record also referred to BLM's application to secure water rights for the lands in question superior to the Knights'. As noted above, it is unnecessary to consider that question, as BLM's rejection of the right-of-way application was justified by the need to avoid the adverse environmental consequences. It should also be noted that BLM's decision was counter to the recommendation of the BLM staff person who prepared the decision document.